IN RE GRASSY OVERLOOK TIMBER SALE

IBLA 89-192 Decided August 14, 1990

Appeal from a decision of the Tillamook Resource Area Manager, Oregon, Bureau of Land Management, denying protest against Grassy Overlook timber sale. OR-080-TS88-711.

Affirmed.

1. Administrative Procedure: Burden of Proof--Federal Land Policy and Management Act of 1976: Land-Use Planning--Rules of Practice: Appeals: Burden of Proof--Timber Sales and Disposals

   A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

   A determination that a proposed action will not have a significant impact on the quality of the human environ-ment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

APPEARANCES: Wendell Wood, Eugene, Oregon, for Oregon Natural Resources Council; Dana R. Shuford, Tillamook Resource Area Manager, Tillamook, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Oregon Natural Resources Council (ONRC) has appealed from an October 25, 1988, decision of the Area Manager, Tillamook Resource Area, Oregon, Bureau of Land Management (BLM), denying its protest of the Grassy Overlook timber sale (OR-080-TS88-711). 1/

Part of the lands in the subject sale are within an area designated as the Nestucca River Area of Critical Environmental Concern (ACEC), pursuant to 43 U.S.C. § 1712(c)(3) (1982). 49 FR 162, 164-65 (Jan. 3, 1984). 2/ The ACEC consists of a primary zone along the Nestucca River and a caution zone which borders the primary zone. The sale lands within the ACEC are within the caution zone 3/ which is to be "managed for multiple resource

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1/ The Grassy Overlook timber sale is in secs. 18 and 19, T. 3 S., R. 6 W., Willamette Meridian, Tillamook County, Oregon, and provides for, inter alia, the clearcutting of 109 acres divided into three separate units all located in sec. 18. The sale map included with the timber sale contract (Exh. A of Case Record Exh. 17) shows Unit 1 with 32 acres, Unit 2 with 33 acres, and Unit 3 with 44 acres. In addition, the contract provided for a limited amount of selective cutting in the surrounding 464.94-acre reserve area.

2/ There is some confusion in the record regarding which sale lands are within the ACEC. In its answer BLM states that the "ACEC encompassed the area of the Grassy Overlook timber sale" (Answer at 1). This, however, was a reference to the original Grassy Overlook sale in 1981, which included only Units 1 and 2, and which resulted in a Government buy-back. The 1988 sale, BLM states in its answer, was commonly referred to as "Grassy Overlook, Grassy Overlook Buyback and Grassy Overlook II" (Answer at 2). Grassy Overlook II added Unit 3. The Environmental Assessment (EA) for the sale (Case Record Exh. 15) states that Units 1 and 2 are within the ACEC. The ACEC map (Case Record Exh. 18 at 19) indicates that part of Unit 3 also is within the ACEC.

3/ Appellant states "the area in which the sale has been planned is apparently in the 'caution' zone of the ACEC, although it is unclear, due to the general scale of BLM's maps * * *" (Statement of Reasons (SOR) at 1). Those maps clearly show, however, that the sale lands within the ACEC are within the caution zone.

use including timber harvesting, but measures will be taken to reduce conflicts with nearby fisheries, scenic and recreational values." 49 FR 165 (Jan. 3, 1984). The May 30, 1984, Management Plan for the Nestucca River Area of Critical Environmental Concern (MP) contains 27 management actions including:

> 1. Sell timber on approximately 513 acres per decade within the caution zone.
>
> Rationale: This will contribute toward meeting the allowable cut commitment specified in the Westside Salem Timber Management Plan (1983) while mitigating adverse impacts to wildlife and visual resources. From all viewpoints along the Nestucca Access Road, the seen portions of all clearcuts for the decade will total approximately 120 acres. The seen portions will vary in size from 5 to approximately 15 acres.
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> 2. Harvest timber in the caution zone so that a minimum of 10 years is left between cutting of adjacent units. * * *.
>
> Rationale: Habitat diversity and vegetative variety benefit wildlife and visual resources. A 10-year time period between harvest of adjacent units increases the likelihood that both adequate food and cover for wildlife will be available in any given area. The 10-year spacing will mitigate impacts on visual resources by dispersing clearcuts over space and time. Also, the screening effect of trees that are at least 10 years old will soften the impact of adjacent clearcut units.

(MP at 10-11).

Subsequent to adoption of the MP, the Federal Timber Contract Payment Modification Act (FTCPMA), P.L. 98-478, 98 Stat. 2213 (1984), became law. Pursuant to FTCPMA, the Secretary of the Interior was authorized to permit the purchasers of certain timber sale contracts to return their contracts to the Government upon payment of a buy-out charge. 16 U.S.C. § 618(a)(1) (Supp. IV 1986). Authorization was further given to offer the sales again "in an orderly fashion as part of, and not in addition to, the normal congressionally authorized timber sales program." 16 U.S.C. § 618(a)(5)(A) (Supp. IV 1986). Certain timber which was designated as already sold in the MP was later returned to the Government pursuant to FTCPMA. 4/

BLM prepared an EA dated July 1, 1987, for the Grassy Overlook timber sale. The EA is tiered to the Westside Salem Timber Management Environmental Impact Statement (EIS) and the Westside Salem Timber Management Record of Decision. A Record of Decision and Finding of No Significant Impact for the Grassy Overlook sale was signed by the Area Manager on August 26, 1988.

4/ As indicated in footnote 2, Units 1 and 2 of the present sale were buy-back units.

On September 12, 1988, ONRC filed a protest of the Grassy Overlook timber sale, and on September 14, 1988, submitted supplemental documents. By decision dated October 25, 1988, BLM denied ONRC's protest and indicated its intent to proceed with award of the sale pursuant to 43 CFR 5003.3(f). Due to BLM's intent to proceed, appellant filed a stay request on November 28, 1988, which was denied by our order dated February 27, 1989.

[1] Several of the arguments presented by appellant concern alleged inconsistencies between the MP and the Grassy Overlook timber sale. When an appellant has challenged a BLM management decision which is based on a consideration of all relevant factors and is supported by the record, the Board will not disturb it, absent a showing of clear reasons for modification or reversal. Wilderness Society, 90 IBLA 221, 232 (1986), and cases cited therein. The responsibility of administering the public lands has been delegated to BLM which must be accorded the discretion necessary in order to effectively discharge its duties. Id.

In its SOR, appellant argues the subject sale is inconsistent with the MP because, as 508 acres have already been sold within the ACEC this decade, the addition of the Grassy Overlook sale will cause the total sales acreage to exceed the 513-acre limit. BLM argues that, including acreage which was sold prior to adoption of the MP, but later resold pursuant to FTCPMA (buy-back acres), only 339 acres have been sold in the relevant time period. The record supports this conclusion. Apparently, appellant mistakenly added 169 buy-back acres to the actual total of 339 to arrive at its 508-acre figure. As the acreage sold prior to the Grassy Overlook sale was 339, and the subject sale consists of 109 acres, it is clear that the sale is consistent with the 513-acre standard set forth in the MP.

BLM further argues that buy-back acres should not be included in a determination whether the MP standards have been met. BLM contends that at the time the MP was adopted, BLM considered the buy-back acres already sold, and based the MP standards on additional timber sale acreage which could be sold consistent with its duty to protect the ACEC pursuant to 43 U.S.C. § 1712(c)(3) (1982).

ONRC has failed to establish that excluding the buy-back acres from the 513-acre limit is reversible error. In the MP, BLM concluded it could fulfill its duty of protecting the ACEC by allowing the harvesting of 513 acres of timber in addition to those acres which were already sold as of May 30, 1984 (MP at 6; MP Fig. 2). Appellant has not established BLM's conclusion was erroneous, nor has it shown BLM was unauthorized to exclude the buy-back acres in application of the 513-acre standard.

ONRC contends the MP has been violated because from all viewpoints along the Nestucca Access Road, the seen portions of all clearcuts for the decade will total over 120 acres. The assertion that more than 120 acres are visible stems from an August 8, 1986, letter from ONRC to BLM which states:

> While we are unable to accurately determine the exact number of recent clearcut acres visable [sic] from the Nestucca River

> Access Road, the Lower Hoag Pass, Hoag Down, Papa Cougar and Broken Heart timber sales (clearcuts), immediately adjacent to the Nestucca River, total 263 acres in the lower portion of the ACEC alone. If you discount clearcuts hidden seasonally by deciduous trees, at least half of this acreage (or something greater than the permitted 120 acres per decade) is already highly visible from the Nestucca Road.

(Aug. 8, 1986, Letter at 2-3).

In its decision denying ONRC's protest, BLM states that only one of the four sales included in the ONRC letter occurred subsequent to adoption of the MP, that more than one-half of the cited sales are not visible from the road due to either topography or deciduous trees, and that excluding buy-back sales, only about 4 acres of sales are visible from the Nestucca Access Road. BLM also maintains that the sentence in the MP which contains the 120-acre figure is simply part of the rationale for the 513-acre standard, rather than a distinct standard, and that the 120 acres should exclude buy-back acres.

ONRC has failed to establish that from all viewpoints along the Nestucca Access Road, the seen portions of all clearcuts for the decade will total more than 120 acres. Page 3 of the BLM decision contains a list of sales in the ACEC since the MP's adoption. Of the four sales mentioned by ONRC in its letter of August 8, 1986, only the 21-acre Hoag Down Salvage sale appears on BLM's list. ONRC does not refute the BLM claim that the Lower Hoag Pass, Papa Cougar, and Broken Heart timber sales occurred prior to the adoption of the MP. In addition, as BLM correctly points out, the 120-acre figure is actually part of the rationale for its 513-acre limitation on the timber sold per decade.

Appellant also argues the Grassy Overlook sale is inconsistent with the MP's second Management Action which reads "Harvest timber in the caution zone so that a minimum of 10 years is left between cutting of adjacent units." Unit 3 of the Grassy Overlook sale and the Grass Clippings sale share a common border for approximately 400 feet (EA at 5). Therefore, ONRC contends the Grassy Overlook sale is inconsistent with the MP. BLM responds by contending the sales are not adjacent because a road separates them and buy-back sales do not count. BLM states the Grass Clippings sale was not a clearcut but rather was an overstory removal that is now well stocked with 18-year old trees, and that the Management Action only refers to clearcuts.

We find it necessary only to reiterate our previous findings on this matter:

> [T]his management action is applicable only in the case of adjacent clearcuts. The stated rationale for this action makes
> it clear that the action is intended to "dispers[e] clearcuts over space and time" (MP at 11). This is further supported by the fact, as BLM notes, that the purposes of the management action, viz., promoting habitat diversity and vegetative variety

> for the overall benefit of wildlife and visual resources, are already well served in the case of clearcutting adjacent to an area, such as the particular unit of the Grass Clippings timber sale involved herein, which, while it has been subjected to overstory removal, contains an understory of 18-year old trees.

(Order of Feb. 27, 1989, at 3).

The ACEC was created in part due to an unusually high concentration of pleuricospora fimbriolata (fringed pinesap) and appellant asserts that the subject sale will not adequately protect this community. BLM argues that it has incorporated various mitigation measures into the sale in order to protect the fringed pinesap population in the ACEC and that ONRC has failed to point to any inadequacy in the mitigation measures adopted.

[2] In the EA, BLM considered the impact on the fringed pinesap community of the subject sale with mitigation measures and a finding was made that the impact would be insignificant. A party challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon & Katherine M. Roush, 112 IBLA 293, 298 (1990). The ultimate burden of proof is on the challenging party (In re Blackeye Again Timber Sale, 98 IBLA 108, 110 (1987)) and the burden must be satisfied by objective proof. In re Upper Floras Timber Sale, 86 IBLA 296, 305 (1985). Mere differences of opinion provide no basis for reversal. Id. We find ONRC has failed to establish the fringed pinesap community in the ACEC will not be adequately protected by the various mitigation measures adopted by BLM.

ONRC asserts that BLM has not conducted a cumulative impact analysis. In its answer, BLM argues that a cumulative impact analysis was performed as part of the EIS. Indeed, in the EA prepared for the Grassy Overlook timber sale BLM analyzed the sale "in consideration of the anticipated operating periods of currently sold but unlogged sales throughout the Resource Area" (EA at 7) and concluded that the cumulative impacts would not exceed those already identified and analyzed in the EIS to which the EA was tiered.

[3] A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts. In re Crane Prairie Timber Sale, 109 IBLA 188, 192 (1989), and cases cited therein. The regulations at 40 CFR 1502.4 and 1502.20 discourage repetitive discussion of the same issues at each level of environmental review. As there is no requirement that a site-specific EA repeat cumulative impact analysis found in a programmatic EIS and ONRC has not established a failure to consider any cumulative impact at some point during the environmental review process, we find no basis for reversal of the BLM decision.

Appellant asserts that the Grassy Overlook timber sale adds to and compounds the cumulative impact of BLM's continuing violation of sustained

yield requirements and that the Columbia Master Unit's annual allowable cut is based on a faulty inventory. We adequately dealt with these issues in our order denying appellant's request for stay:

> [T]o the extent that ONRC is challenging the annual allowable cut itself, the time for objecting thereto has long since passed. See 43 CFR 1610.5-2(a). In any case, ONRC has offered no evidence to substantiate its conclusion that the annual allowable cut will not result in a sustained yield. Therefore, there is no basis for concluding that a violation will occur. See In Re Blackeye Again Timber Sale, 98 IBLA 108, 113 (1987).

(Order of Feb. 27, 1989, at 4).

Appellant argues that due to passage of the Oregon Scenic Waterway System initiative on November 8, 1989, "BLM should be required to reassess the impact of the sale on recreational opportunities along the Nestucca River, including a cumulative impact analysis" (SOR at 2), and requests that BLM specify the exact width of the buffer zone between the Nestucca River and the Grassy Overlook timber sale.

Appellant cites no statutory or regulatory authority for its belief that BLM should be required to reassess sale impacts and we find no reversible error in BLM's decision to proceed with the sale despite passage of the state law. Not only did the Grassy Overlook sale occur prior to passage of the state law, but ONRC has failed to establish a conflict between the subject sale and the state's designation of the Nestucca River as a scenic waterway. The sale maps reveal a buffer zone of land between the Nestucca River and the subject sale which, according to BLM's answer, "averages approximately 400 feet, as measured horizontally" (Answer at 3). ONRC has not established that the buffer zone utilized by BLM is so narrow that the decision to proceed with the sale is reversible error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision of October 25, 1988, is affirmed.

John H. Kelly
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge